

ST 01-0011-PLR 03/28/2001 CONSTRUCTION CONTRACTORS

In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. See 86 Ill. Adm. Code 130.1940 and 130.2075. (This is a PLR).

March 28, 2001

Dear Xxxxx:

This Private Letter Ruling, issued pursuant to 2 Ill. Adm. Code 1200 (see <http://www.revenue.state.il.us/legalinformation/regs/part1200>), is in response to your letter of February 26, 2001. Review of your request for a Private Letter Ruling disclosed that all information described in paragraphs 1 through 8 of subsection (b) of Section 1200.110 appears to be contained in your request. This Private Letter Ruling will bind the Department only with respect to COMPANY for the issue or issues presented in this ruling. Issuance of this ruling is conditioned upon the understanding that neither COMPANY nor a related taxpayer is currently under audit or involved in litigation concerning the issues that are the subject of this ruling request.

In your letter, you have stated and made inquiry as follows:

We respectfully request a ruling from your office on the matter of Retail Occupation Tax liability on post-production material handling equipment furnished pursuant to a furnish and install contract.

This letter is written on behalf of COMPANY as a request for private letter ruling under Title 2 Part 1200 Section 1200.110 of the Illinois Department of Revenue regulations. This request is being made under a power of attorney from COMPANY, a copy of which is enclosed.

BUSINESS a Corporation based in CITY, Illinois, manufactures automotive and aerospace parts as well as materials-handling equipment. BUSINESS entered into a contract with COMPANY to furnish and install drive-in racks and pallet racks (systems) for a distribution facility in CITY2, Illinois. COMPANY, a STATE based Construction Contractor, purchased the equipment and resold it to a Trust. A separate contract was entered into between COMPANY and the Trust for the sole purpose of furnishing and installing these systems. The Trust previously established a lease agreement with AAA, to lease the building and systems to AAA (as lessee). AAA is a manufacturer in Illinois and will use the systems to store finished goods manufactured in their production process.

The total contract between BUSINESS and COMPANY included the collection of use tax by BUSINESS. COMPANY is not registered as a retailer or reseller in the State of Illinois. COMPANY provided a Certificate of Resale, completed without a registration

number, signed by the an agent of COMPANY, to BUSINESS. This Certificate of Resale served as proof to BUSINESS that tax should not be collected. BUSINESS refused to accept the Certificate of Resale and believes that use tax is owed to the Illinois Department of Revenue.

To further convince BUSINESS of the acceptability of the certificate of resale completed without a reseller number as adequate evidence of a sale for resale, COMPANY provided copies of the regulation which allows for "other evidence", general information letter ST-00-0115-GIL, several private letter rulings, and other Department of Revenue correspondence (Attachment A).

Upon receipt of this information, BUSINESS contacted the Department of Revenue and conferred with a sales tax auditor, who advised BUSINESS that they were a subcontractor and would be liable for use tax for all materials purchased and installed. He further advised BUSINESS that the "other evidence" provision did not apply to this situation. COMPANY has been notified that BUSINESS is prepared to file a mechanics lien on the property where the drive-in racks and pallet racks were furnished and installed, if COMPANY does not remit payment for the entire contract amount, including use tax.

As previously discussed, a contract exists between BUSINESS and COMPANY to furnish and install these portable racking and storage systems. The total contract amount is \$1,613,041. The portion of the contract that represents tangible personal property and subject to the Retail Occupation Tax, as computed by BUSINESS is \$1,179,474. Breakdown of the total contract cost is as follows:

Tangible personal property	\$1,179,474.00
Freight from BUSINESS to site	38,200.00
Taxes on personal property	73,717.14
Installation labor	286,670.00
Project/site management	<u>34,979.86</u>
Total costs	<u>\$1,613,041.00</u>

BUSINESS subcontracted the installation of the portable racking and storage systems to BBB., which, in Exhibit J to the contract between COMPANY and BUSINESS, was identified with a STATE2 address.

The portable racking and storage systems are considered tangible personal property for use in post-production material handling (as defined in 86 Ill. Adm. Code 130.331(4)(D)), based on the following:

- They are being installed in a large distribution facility in such a fashion that the move ability and repositioning of the systems could be accommodated with ease. The systems are attached to 4" bolts that are attached to a 6" thick concrete floor.
- The owner has communicated to COMPANY that there may be a need to shift the racks to accommodate different aisle widths, in order to handle different materials in the future. In the event that the systems would need to be repositioned, the bolts would be cut off at the floor, and, the racks would be repositioned.

- The system was standard (off the shelf) from BUSINESS and not a custom made system. The racks are basically frames with beams and accessories to assemble the frames and beams.
- Upon removal, the systems could be resold to other distributors, as they are fairly standard in specifications in the industry.

In this transaction, BUSINESS is considered a manufacturer/supplier of the material handling systems. The installation of these manufactured systems was a part of the contract between COMPANY and BUSINESS. BUSINESS entered into a separate contract with a subcontractor, BBB to provide installation services.

By definition in Section 130.1940 of Title 86 of the Illinois Department of Revenue Regulations, a "...Contractor" means any person who is engaged in the occupation of entering into and performing construction contracts for owners." Further, "...Owner" means any person who enters into a contract with a contractor relative to the construction of a structure." Further, "...Structure" includes...any building...or any other improvement to real estate."

The systems are considered tangible personal property and were furnished and installed under a contract entered into for the sole purpose of furnishing and installing the systems. The systems are portable and not considered to be "an improvement to real estate", or ". The systems are not considered to be tangible personal property incorporated into real estate. The systems are considered to be tangible personal property furnished by BUSINESS, a manufacturer/supplier and subject to Retail Occupation Tax.

COMPANY was not a registered reseller or retailer in Illinois at the time the systems were furnished and installed. Therefore, they could not provide a valid Certificate of Resale. However, we note that the Illinois Retailers' Occupation Tax Act provides as follows:

"Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale. This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale."

COMPANY has provided other evidence of a sale for resale. (Attachment A) The systems are in fact being purchased by COMPANY and sold to the Trust. Therefore, this would constitute a valid sale for resale.

We respectfully request a ruling from the Department on the following:

1. Is BUSINESS considered the end user of the systems and liable for Use tax?
2. Based on the fact and circumstances described above, and, the other evidence provided to BUSINESS by COMPANY, will BUSINESS be liable for sale tax upon audit?

We trust that the contract values and other confidential information will remain confidential, as this is proprietary in nature and could be used by competitors of the involved parties.

To the best of my knowledge, as well as that of the taxpayer, the Illinois Department of Revenue has never issued or been requested to issue a ruling on this matter by COMPANY or any of its affiliates.

Department Response:

The Department must determine the answers to two questions in answering your letter. First is whether BUSINESS is a construction contractor. If BUSINESS is a construction contractor, it is the end user of the property it affixes to realty and thus cannot make sales for resale. If BUSINESS is not a construction contractor it can sell tangible personal property for resale. The next question is whether a certificate of resale be accepted without a registration number.

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling tangible personal property at retail. A "sale at retail" is any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. See the enclosed copies of 86 Ill. Adm. Code 130.101 and 130.201.

Please find enclosed copies of 86 Ill. Adm. Code 130.1940 and 130.2075 regarding the tax liabilities of contractors in Illinois. The term "construction contractors" includes general contractors, subcontractors, and specialized contractors such as landscape contractors. The term "contractor" means any person or persons who are engaged in the occupation of entering into and performing construction contracts for owners. In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. Therefore, any tangible personal property that general contractors or subcontractors purchase that will be permanently affixed to or incorporated into real property in this State will be subject to Use Tax. If contractors did not pay the Use Tax liability to their suppliers, contractors must self-assess their Use Tax liability and pay it directly to the Department.

Construction contractors incur Retailers' Occupation Tax liability when they engage in selling any kind of tangible personal property to purchasers without permanently affixing the tangible personal property to real estate. See 86 Ill. Adm. Code 130.1940(b)(1). Construction contractors can purchase such tangible personal property tax-free for resale by providing their suppliers with Certificates of Resale. See 86 Ill. Adm. Code 130.1405, enclosed. Their Illinois suppliers and suppliers who are "retailers maintaining a place of business in Illinois," must retain certificates of resale in order to document the resale exemption.

A retailer would not be liable for Retailers' Occupation Tax on the gross receipts from a sale when the retailer accepts a Certificate of Resale (see, 86 Ill. Adm. Code 130.1405) that contains a valid registration number. If a retailer properly documents a sale for resale with a Certificate of Resale containing a valid registration number, the retailer is not required to determine if the purchaser actually resells the items or instead uses or consumes them.

While active registration or resale numbers on Certificates of Resale are still preferred, the Illinois Retailers' Occupation Tax Act provides as follows:

"Failure to present an active registration number or resale number and a certification to the seller that a sale is for resale creates a presumption that a sale is not for resale.

This presumption may be rebutted by other evidence that all of the seller's sales are sales for resale or that a particular sale is a sale for resale." 35 ILCS 120/2c.

Including registration or resale numbers on Certificates of Resale is the preferred method for documenting that purchases are purchases for resale. However, in light of this statutory language, certifications on Certificates of Resale in lieu of resale numbers which described the situation and the fact that the purchasers have no contact with Illinois which would require them to be registered and that such purchasers choose not to obtain Illinois resale numbers would constitute evidence that this particular sale is a sale for resale despite the fact that no registration number or resale number is provided. The risk run by companies in accepting such a certification and the risk run by purchasers in providing such a certification is that an Illinois auditor is much more likely to go behind a Certificate of Resale which does not contain a valid resale number and require that more information be provided as evidence that the particular sale was, in fact, a sale for resale.

The racking and storage systems you described are attached to 4-inch bolts that are imbedded in a 6-inch thick concrete floor. In order to move the racks, the bolts have to be cut off at the floor. These racks are permanently attached to realty. The information in your letter indicates that BUSINESS is the party that permanently affixes this tangible personal property to real estate. Therefore, BUSINESS is a construction contractor and is liable for Use Tax on the cost price of the tangible personal property it affixes to real estate. BUSINESS cannot accept a Certificate of Resale for such sales. Whether, as a matter of contract law, COMPANY is responsible for reimbursing BUSINESS for the amount of Use Tax BUSINESS has incurred is a private matter between the parties.

The facts upon which this ruling are based are subject to review by the Department during the course of any audit, investigation, or hearing and this ruling shall bind the Department only if the material facts as recited in this ruling are correct and complete. This ruling will cease to bind the Department if there is a pertinent change in statutory law, case law, rules or in the material facts recited in this ruling.

I hope this information is helpful. If you have further questions concerning this Private Letter Ruling, you may contact me at (217) 782-2844. If you have further questions related to the Illinois sales tax laws, please visit our website at www.revenue.state.il.us or contact the Department's Taxpayer Information Division at (217) 782-3336.

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.